

1 DAVID H. KRAMER, State Bar No. 168452
2 COLLEEN BAL, State Bar No. 167637
3 LISA A. DAVIS, State Bar No. 179854
4 BART E. VOLKMER, State Bar No. 223732
5 WILSON SONSINI GOODRICH & ROSATI
6 Professional Corporation
650 Page Mill Road
Palo Alto, CA 94304-1050
Telephone: (650) 493-9300
Facsimile: (650) 565-5100
DKramer@wsgr.com

7 JONATHAN M. JACOBSON, N.Y. State Bar No. 1350495
8 WILSON SONSINI GOODRICH & ROSATI
9 Professional Corporation
12 East 49th Street, 30th Floor
10 New York, NY 10017-8203
Telephone: (212) 999-5800
Facsimile: (212) 999-5899
JJacobson@wsgr.com

11
12 Attorneys for Defendant
Google, Inc.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

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NOTICE OF MOTION AND MOTION

2 PLEASE TAKE NOTICE that on October 27, 2006 at 9:00 a.m., or as soon thereafter as
3 counsel may be heard by the above-entitled Court, located at 280 South First Street, Courtroom 3,
4 5th Floor, San Jose, California, 95113, in the courtroom of the Honorable Jeremy Fogel,
5 defendant Google Inc. (“Google”) will and hereby does move the Court, pursuant to Rule 12(b)(6)
6 and Rule 12(b)(1) of the Federal Rules of Civil Procedure, for an order dismissing the Second
7 Amended Complaint of Kinderstart.com LLC (“KinderStart”) in its entirety. This motion is based
8 on this Notice of Motion and Motion, the Memorandum of Points and Authorities filed herewith,
9 the Declaration of Bart E. Volkmer (“Volkmer Decl.”), the accompanying Request for Judicial
10 Notice and the materials referenced therein, the pleadings and papers on file in the action, and
11 upon such other matters as may be presented to the Court at the time of the hearing.

MEMORANDUM OF POINTS & AUTHORITIES

INTRODUCTION

14 On July 13, 2006, this Court entered a detailed 23-page order dismissing KinderStart’s
15 extensive First Amended Complaint (“FAC”) in its entirety. The Court found each of the FAC’s
16 many counts legally deficient, often on multiple grounds. The Court, however, granted
17 KinderStart leave to replead – providing KinderStart an opportunity to correct the FAC’s
18 numerous flaws. The Second Amended Complaint (“SAC”), however, does no such thing.
19 Instead, KinderStart has filed an astonishingly prolix 62-page SAC, containing 282 paragraphs of
20 largely incomprehensible allegations, that does not even attempt to cure the legal deficiencies this
21 Court had found. Adding length, confusion, as well as an entirely new (and untenable) claim does
22 nothing to support KinderStart’s case. But that is all the SAC does. The SAC should be
23 dismissed – this time with prejudice.

PROCEDURAL HISTORY

25 KinderStart filed its original complaint, containing seven claims for relief and spanning
26 116 paragraphs, on March 17, 2006, but never served it. After nearly a month, KinderStart filed
27 and served the nine-claim, 175 paragraph FAC on April 12, 2006. Google moved to dismiss the
28 FAC for failure to state a claim, and filed a special motion to strike several of the claims pursuant

1 to California's anti-SLAPP statute. In an Order dated July 13, 2006, the Court granted Google's
 2 motion to dismiss with leave to amend, and deferred ruling on Google's motion to strike. Six
 3 weeks later, KinderStart filed its bloated SAC. KinderStart continues to style the case as a
 4 putative class action brought on behalf of various classes and subclasses of website operators who
 5 wish to have the Court instruct Google on whether and how to recommend their sites in Google
 6 search results and to have the Court determine the PageRank rating that Google should assign to
 7 their sites. *Id.* ¶¶ 187-195.

8 ARGUMENT

9 I. GOOGLE IS IMMUNE FROM LIABILITY FOR ITS SEARCH RESULTS AND 10 PAGERANKS

11 While buried in the morass of KinderStart's SAC, the heart of this case remains
 12 KinderStart's unhappiness with Google's search results and PageRanks. At bottom, KinderStart
 13 continues to believe it is entitled to override Google's decision to exclude KinderStart's site from
 14 its search results, and its choice to assign KinderStart's site a rating of "PageRank 0" ("0-PR").
 15 KinderStart's specific claims for relief suffer from numerous substantive flaws discussed below.
 16 But to the extent KinderStart attacks Google's editorial decisions themselves, KinderStart cannot
 17 state a claim no matter what theory it advances because Google is shielded from all liability both
 18 by the First Amendment and by 47 U.S.C § 230(c)(2), a federal statutory immunity granted to
 19 online service providers.

20 A. Google's Search Results and PageRanks are Entitled to Full First Amendment 21 Protection

22 Central to KinderStart's action is the premise that what Google says about the KinderStart
 23 site has great significance. Nevertheless, KinderStart unabashedly claims the right to force
 24 Google to say things about KinderStart's site that KinderStart would like Google to say, and to
 25 prevent Google from saying things that KinderStart does not like. To the extent the action rests on
 26 what Google is saying or not saying in its search results and PageRanks themselves, however,
 27 Google's free speech rights function as an absolute bar.

1 When a user submits a query to Google's search engine, Google responds with search
 2 results that are the equivalent of a suggested reading list.¹ Google's search results express
 3 Google's views on what websites Google believes are most likely to be of interest to users for a
 4 particular topic. SAC ¶¶ 123, 125. Similarly, Google's PageRanks provide users with Google's
 5 view of the "importance" of websites. FAC ¶ 56 (PageRank provides a "relative measure of the
 6 appeal, popularity and relevance of a web site."). They are, in KinderStart's own words, Google's
 7 "ratings" for websites. SAC ¶ 46 ("PageRank ... is now the de facto and prevailing standard for
 8 rating Websites throughout the United States.").

9 Recommendations and ratings such as Google's are plainly opinions, entitled to the
 10 protections of both the First Amendment and the California Constitution. *Baker v. Los Angeles*
 11 *Herald Examiner*, 42 Cal. 3d 254, 268 (1986) (dismissing action against newspaper for allegedly
 12 defamatory statements in newspaper's review of television show because statements and review as
 13 a whole constitute constitutionally-protected expressions of opinion); *Blatty v. N.Y. Times Co.*, 42
 14 Cal. 3d 1033, 1048 (1986) (holding that a newspaper cannot be held liable for failing to include a
 15 book on its "Best Sellers" list because the paper's speech in choosing whom to include on the list
 16 is absolutely protected by the First Amendment); *Moyer v. Amador Valley Joint Union High Sch.*
 17 *Dist.*, 225 Cal. App. 3d 720, 724-26 (1990) (dismissing various claims arising from newspaper
 18 article labeling plaintiff as "the worst teacher" at the school based on free speech protections
 19 afforded to the opinion); *Jefferson County Sch. Dist. v. Moody's Inv. Servs., Inc.*, 175 F.3d 848
 20 (10th Cir. 1999) (dismissing claims based on defendant's rating of plaintiff's bonds in light of free
 21 speech protections afforded to the rating); *Search King Inc. v. Google Tech., Inc.*, No. 02-1457,
 22 2003 WL 21464568, at *4 (W.D. Okla. May 27, 2003) (dismissing claim based on Google's
 23 search results and PageRanks in light of Google's free speech rights because Google's opinions
 24

25
 26 ¹ The Ninth Circuit generally has described a search engine as follows: "When a keyword is
 27 entered, the search engine processes it through a self-created index of web sites to generate a
 28 (sometimes long) list relating to the entered keyword. Each search engine uses its own algorithm
 to arrange indexed materials in sequence, so the list of web sites that any particular set of
 keywords will bring up may differ depending on the search engine used." *Brookfield Commc'n's,*
Inc. v. West Coast Entm't Corp., 174 F.3d 1036, 1045 (9th Cir. 1999).

1 are “entitled to ‘full constitutional protection.’”). As the California Supreme Court explained in
 2 *Baker*:

3 The point of any review – whether it be of a book, a movie, a play, a television program, or
 4 some other event – is to convey the reviewer’s opinion and professional evaluation of the
 5 thing being reviewed. People read reviews expressly to find out the reviewer’s opinion.
 Readers use that opinion to help them decide whether it is worth spending their time and/or
 money to attend a particular event, go to a particular place or read a particular book.

6 *Baker*, 42 Cal. 3d at 268. Google’s search results and PageRanks are no different. Millions of
 7 people rely on Google for Google’s opinions about the relevance and importance of websites. As
 8 KinderStart itself explains, other search engines express different views about which sites will be
 9 of interest to users on a particular topic. *See SAC ¶¶ 34, 42* (noting Microsoft and Yahoo rank
 10 sites differently than Google does); *See also Brookfield*, 174 F.3d at 1045 (explaining how
 11 different search engines yield different results); *Search King*, 2003 WL 21464568, at **4-5.
 12 (“PageRanks are opinions” and “do not contain provably false connotations. Other search
 13 engines express different opinions, as each search engine’s method of determining relative
 14 significance is unique.”). KinderStart also expressly acknowledges that PageRanks are opinions
 15 containing at least some subjective elements. SAC ¶ 7 (a “PageRank ... it is a figure *not* simply
 16 reflecting an opinion of *a solely subjective value* of a Website by Google, but *an opinion* based
 17 upon a rigorous, objective calculation . . .”) (emphasis added).

18 These opinions are absolutely protected under the First Amendment, and KinderStart
 19 cannot impose liability upon Google for expressing them. *Lowe v. S.E.C.*, 472 U.S. 181, 210 n.58
 20 (1985) (“we have squarely held that the expression of opinion about a commercial product ... is
 21 protected by the First Amendment”), *citing Bose Corp. v. Consumers Union of U.S., Inc.*, 466
 22 U.S. 485, 513 (1984); *Partington v. Bugliosi*, 56 F.3d 1147, 1156 (9th Cir. 1995) (“if it is plain
 23 that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise,
 24 rather than claiming to be in possession of objectively verifiable facts, the statement is not
 25 actionable.”), *quoting Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (7th Cir. 1993). For the
 26 same reason, KinderStart cannot force Google to include the KinderStart site in Google’s search
 27 results or to assign it a particular PageRank. *See Hurley v. Irish-American Gay, Lesbian &*
 28 *Bisexual Group of Boston*, 515 U.S. 557 (1995) (requiring defendants to alter the expressive

1 content of their parade violated the First Amendment); *Miami Herald Pub. Co. v. Tornillo*, 418
 2 U.S. 241, 258 (1974) (striking down a law that required newspapers to conspicuously publish
 3 replies to attacks on an election candidate's character); *ARP Pharmacy Servs., Inc. v. Gallagher*
 4 *Bassett Servs., Inc.*, 138 Cal. App. 4th 1307, 1314 (2006) (statute requiring prescription drug
 5 claims processors to submit drug processing costs to their clients was unconstitutional because it
 6 improperly compelled speech; “[t]he prohibition against compelled speech encompasses
 7 compelled access, where a speaker is required to disseminate the speech of another, even if not
 8 required to endorse the content.”). Thus, in considering KinderStart's claims, the Court should
 9 reject any effort to impose liability on Google, whether directly or indirectly, for removing
 10 KinderStart's website from its search results or for assigning it a 0-PR.

11 **B. Google is Immune from Liability for Restricting Access to the KinderStart**
 12 **Website Under the Communications Decency Act**

13 KinderStart's refrain in this case has been that by excluding KinderStart's site from
 14 Google's search results, and by assigning the site a 0-PR, Google has engaged in “Blockage” and
 15 censorship. *See, e.g.*, SAC ¶ 11. But any such claims against an interactive computer service like
 16 Google are barred as a matter of federal law.

17 Section 230 of the Communications Decency Act (“CDA”), entitled “Protection for private
 18 blocking and screening of offensive material,” states in relevant part:

19 No provider . . . of an interactive computer service shall be held liable on account of . . . any
 20 action taken in good faith to restrict access to or availability of material that the provider or
 user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing or
 21 otherwise objectionable, whether or not such material is constitutionally protected.

22 47 U.S.C. § 230(c)(2)(A). Congress enacted this protection to encourage service providers to
 23 exercise control over the material presented to its users. *See* 47 U.S.C. § 230(b)(1) & (4) (reciting
 24 Congress's intention to encourage to “promote the continued development of the Internet and
 25 other interactive computer services” and “the development and utilization of blocking and
 26 filtering technologies”). As the Ninth Circuit has explained, the protections of Section 230 were
 27 intended to be broad, “protecting service providers and users from liability for claims arising out
 28 of the removal of potentially ‘objectionable’ material from their services.” *Batzel v. Smith*, 333

1 F.3d 1018, 1030 n.14 (9th Cir. 2003); *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1321 n.3 (11th
 2 Cir. 2006) (“The language of section 230(c)(2) is clearly inconsistent with state law that makes
 3 interactive service providers liable based on their efforts to screen content.”). And in accordance
 4 with the plain language of the statute, courts have deferred to service providers’ determinations as
 5 to what is “objectionable” content, applying Section 230(c)(2), for example, to shield a provider
 6 from liability for restricting access to email that the provider determined was undesirable “spam.”
 7 *See Green v. America Online, Inc.*, 318 F.3d 465, 473 (3d Cir. 2003) (relying on § 230(c)(2) to
 8 find AOL immune from false advertising claim for restricting user access to email that AOL
 9 considered objectionable “spam”); *America Online, Inc. v. GreatDeals.Net*, 49 F. Supp. 2d 851,
 10 864 (E.D. Va. 1999) (relying on § 230(c)(2) to find that “blockage” of spam is “encouraged by
 11 federal law” and thus not wrongful); *see also Blumenthal v. Drudge*, 992 F. Supp. 44, 52 n.13
 12 (D.C. Cir. 1998) (explaining that while § 230(c)(2) “primarily addresses obscenity and violent
 13 material, it also references material that is ‘otherwise objectionable,’ a broad enough category to
 14 cover defamatory statements as well.”).

15 There can be no doubt that Google is an interactive computer service under Section
 16 230(c)(2).² It is equally clear, given KinderStart’s own allegations, that Google’s actions
 17 regarding the KinderStart website fall squarely within the protections of Section 230(c)(2)(A).

18 With respect to Google’s removal of KinderStart’s site from its search results, KinderStart
 19 has already alleged that Google’s “Blockage” is “presumably based on either stated or unstated
 20 ‘quality guidelines.’” Original Complaint ¶ 23 (“Compl.”).³ The guidelines, as KinderStart

22 ² “Interactive computer service” is defined broadly as “any information service, system or
 23 access software provider that provides or enables computer access to by multiple users to a
 24 computer server . . .” 47 U.S.C. § 230(f)(2). Courts have uniformly held that search engines like
 25 Google are interactive computer services. *See, e.g., Parker v. Google Inc.*, 422 F. Supp. 2d 492
 26 (E.D. Pa. 2006) (“there is no doubt that Google qualifies as an ‘interactive computer service’”
 and is subject to the protections of 47 U.S.C. § 230); *Novak v. Overture Servs., Inc.*, 309 F. Supp.
 2d 446, 452-53 (E.D.N.Y. 2004) (same); *see also Carafano v. Metrosplash.Com. Inc.*, 339 F.3d
 1119 (9th Cir. 2003) (online matchmaking service held to be interactive service provider under
 Section 230(c)).

27 ³ The allegations of KinderStart’s Original Complaint and FAC are judicial admissions.
 28 *Sicor Ltd. v. Cetus Corp.*, 51 F.3d 848, 859 (9th Cir. 1994). That these allegations were dropped
 from the SAC makes them no less binding, as KinderStart has not asserted that its prior
 allegations were false or a justifiable mistake, or provided some other explanation for why it
 (continued...)

1 alleges, state that Google will block sites containing content that appears aimed at creating
 2 artificially inflated search results for sites by gaming Google's processes. FAC ¶¶ 44-45. That is,
 3 KinderStart itself has pled that Google's "Blockage" is based on its determination that sites
 4 contain content that Google finds objectionable (and that its users will find objectionable) because
 5 it will lead users of the search engine to sites of no interest to them.⁴ Indeed, that is what
 6 KinderStart claims happened in its case. *See* KinderStart's Motion for Preliminary Injunction at
 7 11 ("Defendant Google incredulously determined that KS.com was no longer 'relevant' on the
 8 Internet and removed it from Google's index.").⁵ Just as AOL had immunity under Section
 9 230(c)(2) in the *Green* and *Great Deals* cases for blocking what it thought to be spam, so too is
 10 Google immune under all of KinderStart's claims for restricting access to what Google determines
 11 to be "web spam." *See* FAC ¶ 64 (equating "Blockage" with "anti-Webspamming"); SAC ¶ 228.⁶

12 KinderStart likewise supplies the allegations necessary to establish the application of
 13 Section 230(c)(2) to Google's assignment of 0-PR to the KinderStart site. According to
 14 KinderStart, Google's purpose in assigning 0-PRs to websites is to "punish Websites for carrying

15 _____
 16 (...continued from previous page)
 17 should not be bound by them. *Valdiviezo v. Phelps Dodge Hidalgo Smelter, Inc.*, 995 F. Supp.
 18 1060, 1065-66 & n.6 (D. Ariz. 1997); *United States v. McKeon*, 738 F.2d 26, 31 (2d Cir. 1984)
 19 ("A party ... cannot advance one version of the facts in its pleadings, conclude that its interests
 would be better served by a different version, and amend its pleadings to incorporate that
 version, safe in the belief that the trier of fact will never learn of the change in stories.").

20 ⁴ For a detailed discussion of this issue, known as "web spamming," and the harm to both
 21 search engines and their users that it causes, *see Splog, How to Stop a New Menace on the*
Internet, 19 Harv. J.L. & Tech., No. 2 at 479 (Spring 2006) at 479 (describing "link spam" –
 22 deceptive tactic of manufacturing artificial links to fool users and search engines – as disrupting
 user attempts to search for information of relevance).

23 ⁵ As KinderStart concedes, Google fully discloses this important practice of ensuring its
 24 search results remain relevant to users. SAC ¶ 153. Google clearly states on its site that a page
 25 may be "manually removed from our index if it [does not] conform with the quality standards
 necessary to assign accurate PageRank." *Id.* It goes on to explain that its quality standards deem
 26 content objectionable if it appears intended "for the purposes of fooling search engines." *Id.* *See also* SAC ¶ 87 (Google represents that removal of sites and content from its index is done to
 address "spamming" the index). Google's practice of policing sites containing objectionable
 content is hardly a secret to KinderStart or anyone else.

27 ⁶ KinderStart leaves no doubt that Google believes its actions are authorized and proper. *See*
 28 FAC at ¶¶ 46-48 ("It is the *belief* and practice maintained by Defendant Google that ... it is
 entitled at any time, for any reason or no reason at all, to block or remove referrals, listings and
 indexing of any Website on the Internet.") (emphasis added).

1 content of questionable or irrelevant quality in Google’s absolute and internal discretion (‘Inferior
 2 Page Quality’ (‘IPQ’)).” SAC ¶ 144. KinderStart further alleges that Google “executes the
 3 operation of a software filter to programmatically punish a Website with a 0-PR [that] [Google]
 4 believes to have IPQ.” SAC ¶ 145. Thus, KinderStart itself pleads that Google’s assignment of a
 5 0-PR is designed to “punish” websites that carry inferior content that Google determines is
 6 objectionable. Further, according to KinderStart, this “punishment” functions as a blacklist,
 7 causing “hundreds perhaps thousands of other Websites to immediately terminate links to the
 8 penalized site” thereby decreasing user visits to the site. SAC ¶ 146 (“The adverse effect is both
 9 immediate and viral to an entire network of Websites on the Internet.”); SAC ¶ 281 (Because of
 10 the 0-PR Google assigns to KS.com and others “prospective … viewers of such deranked sites …
 11 refrain from … visiting … such sites”). Under KinderStart’s own allegations, therefore, in
 12 assigning a 0-PR, Google has taken action to restrict access to material that it determines to be
 13 objectionable. Under Section 230(c), KinderStart’s claims predicated on that conduct, which
 14 appear to be all of the claims in the SAC, fail as a matter of law.

15 **II. THE COURT SHOULD DISMISS KINDERSTART’S SHERMAN ACT CLAIMS
 16 WITH PREJUDICE**

17 Kinderstart’s FAC asserted claims against Google for attempted monopolization and
 18 monopolization under Section 2 of the Sherman Act. The essence of both claims was the same. It
 19 was that Google’s alleged “Blockage” of the KinderStart.com website and its claimed
 20 “devaluation” of the PageRank assigned to that website constituted exclusionary conduct,
 21 allowing Google to monopolize or to attempt to monopolize markets the FAC defined as the
 22 “Search Engine Market,” the “Search Ad Market,” and the “Website Rating Market.” FAC ¶¶
 23 112-35, 145-53.

24 This Court dismissed both of KinderStart’s antitrust claims, finding the allegations wholly
 25 inadequate on multiple grounds. Order at 11-15, 17-18. KinderStart’s SAC addresses none of the
 26 multiple deficiencies identified in the Court’s opinion. The antitrust claims should therefore be
 27 dismissed with prejudice.

1 **A. Attempted Monopolization**

2 As the Court explained in its opinion, to maintain a claim for attempted monopolization
 3 under Section 2 of the Sherman Act, a plaintiff must – among other things – allege sufficiently the
 4 following essential elements: (1) an appropriate definition of the relevant market, Order at 11-12
 5 & n.2; (2) anticompetitive or exclusionary conduct, *id.* at 11-12; and (3) causal antitrust injury, *id.*;
 6 *see also* Hearing Trans., June 30, 2006, at 5. The SAC fails to satisfy any of these requirements.

7 1. **Market definition.** The Court’s opinion explained that KinderStart’s FAC did “not
 8 sufficiently describ[e] the markets relevant to its claim.” Order at 12 n.2. In particular, the Court
 9 said, it was “unclear how the Search Engine Market … is separable from the Search Ad Market .
 10 …” *Id.* The SAC does not cure these defects. Although the SAC’s description of the purported
 11 markets is a good deal more verbose than that in the FAC, *compare* SAC ¶¶ 34-39 *with* FAC ¶¶
 12 113-14, it does not even attempt to describe how the two purported markets might be severable
 13 from one another. This failure to articulate any distinction between the purported market is
 14 important because KinderStart does not allege that either it or Google derives any revenues from
 15 Internet searches. Rather, the only money to be made – and the only market in which KinderStart
 16 asserts any injury – is the advertising market. In connection with that purported “Search Ad
 17 Market,” however, KinderStart provides no facts whatsoever to suggest that it is a relevant
 18 product market for antitrust purposes.

19 To allege a relevant market sufficient to withstand dismissal under Rule 12(b)(6), an
 20 antitrust plaintiff is required to set forth facts that, if proven, would establish that the product
 21 market alleged is not interchangeable with reasonable substitutes; “conclusory assertion[s] …
 22 [are] insufficient.” *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063-64 (9th Cir. 2001); *Big Bear*
 23 *Lodging Ass’n v. Snow Summit, Inc.*, 182 F.3d 1096, 1105 (9th Cir. 1999); *Queen City Pizza, Inc.*
 24 *v. Domino’s Pizza, Inc.*, 124 F.3d 430, 438 (3d Cir. 1997); *Newcal Indus., Inc. v. Ikon Office*
 25 *Solutions, Inc.*, No. C04-2776, 2004 WL 3017002, at **3-5 (N.D. Cal. Dec. 23, 2004).

26 In this case, KinderStart has alleged no facts whatsoever to suggest that other forms of
 27 advertising are not reasonably interchangeable with search engine advertising. There is nothing in
 28 the SAC that even attempts to explain why advertising on websites other than search engines – or,

1 for that matter, e-mail, direct mail, advertising in magazines, newspapers, radio stations,
 2 television, billboards, or public transportation vehicles – is not a commercially acceptable manner
 3 of reaching potential customers.

4 In *GreatDeals.net*, 49 F. Supp. 2d 851, similar antitrust claims were dismissed under Rule
 5 12(b)(6) on precisely this basis. The defendant there asserted that AOL was monopolizing an “e-
 6 mail advertising” market and a “distinct sub-market based on the Internet subscribers who are
 7 accessed through AOL facilities.” *Id.* at 857. The court held that it “must reject [GreatDeal’s]
 8 proposed market.” *Id.* at 858. Specifically, “the Court rejects [the] attempt to restrict the market
 9 to e-mail advertising. . . . There are numerous substitutes for e-mail advertising, some of which are
 10 less expensive, including use of the World Wide Web, direct mail, billboards, television,
 11 newspapers, radio, and leaflets, to name a few.” *Id.* Just as GreatDeal’s allegations had to be
 12 dismissed for failure to articulate why these alternatives were not reasonably interchangeable,
 13 KinderStart’s identical failure warrants dismissal here.

14 2. ***Exclusionary conduct.*** The central failure of KinderStart’s FAC antitrust claims,
 15 and the focus of most of this Court’s analysis, was on the failure to plead facts sufficient to
 16 suggest that Google has engaged in any conduct deemed exclusionary under Section 2. The SAC
 17 repeats (with greater length) the FAC allegations concerning PageRank and Blockage; expands
 18 upon the FAC’s assertions of “false representations” and the use of AdSense; and adds a new set
 19 of allegations concerning Google’s pricing practices. Each set of allegations is addressed below.
 20 None, whether considered singly or in the aggregate, suffices as a sufficient allegation of
 21 exclusionary conduct under applicable law. *See United States v. Microsoft Corp.*, 253 F.3d 34, 78
 22 (D.C. Cir. 2001) (liability cannot be based on the aggregate effect of a series of acts which “are
 23 not in themselves unlawful” or exclusionary).

24 a. ***PageRank and Blockage.*** This Court has previously considered, and
 25 rejected, KinderStart’s allegations that the claimed PageRank devaluation and “Blockage” of its
 26 website constitute exclusionary conduct. As the Court explained: “KinderStart’s allegations that
 27 Google removed KinderStart from search results and lowered its PageRank do not suffice to
 28 allege predatory conduct as opposed to legitimate competitive actions. ‘[A]s a general matter

1 “there is no duty to aid competitors.”” *MetroNet Serv. Corp. v. Qwest Corp.*, 383 F.3d 1124, 1131
 2 (9th Cir. 2004).” Order at 12. *Accord, e.g., Verizon Commc’ns, Inc. v. Law Offices of Curtis V.*
 3 *Trinko, LLP*, 540 U.S. 398, 407-10 (2004); *California Computer Prods., Inc. v. IBM*, 613 F.2d
 4 727, 744 (9th Cir. 1979) (“IBM, assuming it was a monopolist, had the right to redesign its
 5 products to make them more attractive to buyers whether by reason of lower manufacturing cost
 6 and price or improved performance. It was under no duty to help CalComp or other peripheral
 7 equipment manufacturers survive or expand. IBM need not have ... constricted its product
 8 development so as to facilitate sales of rival products. The reasonableness of IBM's conduct in
 9 this regard did not present a jury issue.”); *Bayou Bottling, Inc. v. Dr Pepper Co.*, 725 F.2d 300,
 10 304-05 (5th Cir. 1984) (monopolist soft drink bottler had no obligation to allow rival bottlers
 11 space in its coolers or vending machines). KinderStart’s SAC adds length, but nothing new of
 12 substance, to its prior allegations.

13 b. ***Alleged “False Statements.”*** The SAC adds a number of new – albeit
 14 baseless – allegations about “false” statements. SAC ¶¶ 59, 61. In brief, these allegations claim
 15 that Google represents that its search results are objective and not subject to the exercise of
 16 judgment; that these representations are false; and therefore that the lowered KinderStart.com
 17 PageRank and omission from Google search results are disparaging and, in some unstated manner,
 18 harmful to competition. The allegations, however, suffer from a number of fatal flaws.

19 First, as the Seventh Circuit recently explained, even where a monopolist’s statements
 20 about its rivals’ products really are material, false, and disparaging, those statements are not
 21 anticompetitive or predatory. On the contrary, “[a]ntitrust law condemns practices that drive up
 22 prices by curtailing output. False statements about a rival’s goods do not curtail output in either
 23 the short or long run. They just set the stage for competition in a different venue: the advertising
 24 market.” *Sanderson v. Culligan Int’l Co.*, 415 F.3d 620, 623 (7th Cir. 2005) (citations omitted).
 25 The court added: “Warfare among suppliers and their different products *is* competition. Antitrust
 26 law does not compel your competitor to praise your product or sponsor your work. To require
 27 cooperation or friendliness among rivals is to undercut the intellectual foundations of antitrust
 28

1 law.” *Id.* (quoting *Schachar v. American Acad. of Ophthalmology, Inc.*, 870 F.2d 397, 399 (7th
2 Cir.1989)).

3 Second, even under cases that suggest that disparagement might qualify as exclusionary
4 conduct in some circumstances, the hurdles for alleging a viable claim are necessarily steep:

5 To prove that [a defendant’s] false and misleading advertising constituted exclusionary
6 conduct, the disparagement must overcome a presumption that the effect on competition of the
7 fliers was de minimis. “[A] plaintiff may overcome de minimis presumption ‘by
8 cumulative proof that the representations were [1] clearly false, [2] clearly material, [3] clearly
likely to induce reasonable reliance, [4] made to buyers without knowledge of the subject
matter, [5] continued for prolonged periods, and [6] not readily susceptible of neutralization or
other offset by rivals.” [The plaintiff] must satisfy *all* six elements to overcome [this] de
minimis presumption.
9

10 *American Prof'l Testing Serv., Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns, Inc.*,
11 108 F.3d 1147, 1152 (9th Cir. 1997) (citations omitted).

12 KinderStart cannot satisfy these requirements. For starters, the statements on which it
13 relies are not in any way “clearly false” or “clearly likely to induce *reasonable* reliance.”
14 KinderStart itself has conceded that Google makes clear that its search results (and therefore its
15 PageRanks) *are* subject to adjustments based on its Quality Guidelines and, in fact, that pages
16 may be “manually removed.” FAC ¶¶ 44-45. KinderStart acknowledges that Google has made
17 clear that it does not “comment on the individual reason a page was removed” and does not “offer
18 an exhaustive list of practices that can cause removal,” but that Google recommends in any event
19 that websites “avoid ‘doorway’ pages created just for search engines ... with little or no original
20 content” and avoid creating “domains with substantially duplicate content” (*id.*) – features that
21 one necessarily encounters when browsing KinderStart.com.

22 Third, KinderStart has failed to address any of the reasons given previously by this Court
23 for dismissing the prior “false misrepresentations” allegations as legally insufficient. Order at 13-
24 14. KinderStart provides no explanation of how manual adjustment of search results – whether
25 “falsely concealed” or not – could possibly be anticompetitive rather than a process designed to
26 improve the quality of Google’s product. If Google is as popular as KinderStart claims, it is
27 beyond dispute that the free market has made a choice to prefer Google searches to those offered
28 by its many competitors. As was explained in a leading case, it is “the free market and not a judge

1 or a jury decides whose products are inferior.” *Olympia Equip. Leasing Co. v. Western Union Tel.*
 2 *Co.*, 797 F.2d 370, 378 (7th Cir. 1986). Arguments about techniques that make firms successful
 3 in satisfying consumers should be fought in the market, not the courts.

4 c. **AdSense**. This Court dismissed the FAC’s allegations about AdSense
 5 because the FAC provided no explanation as to how Google was supposed to be “pressuring
 6 websites to purchase advertising to avoid decreased PageRank scores, and removal from Results
 7 pages,” or how such pressure might have harmed KinderStart in an exclusionary way. Order at
 8 13. The SAC does not address these deficiencies.

9 In paragraph 62, the SAC asserts that Google has terminated AdSense contracts of
 10 competitors “arbitrarily” and without justification, and that this has caused a reduction in “vital”
 11 revenues to these AdSense partners. The most these allegations say is that, if Google terminates
 12 an AdSense contract, the terminated advertiser must look elsewhere for advertising revenue. That
 13 is not an allegation of exclusionary conduct for at least three reasons.

14 First, KinderStart nowhere explains how a website owner using Google’s AdSense to
 15 derive advertising revenue might be deemed a *competitor* of Google’s in that respect or, perhaps
 16 more importantly, how termination of an AdSense contract would in any way enhance Google’s
 17 purported market power. A refusal to deal with a non-competitor does not increase the
 18 defendant’s market share at the expense of its rivals and, therefore, is not actionable. *See, e.g.*,
 19 *Soap Opera Now, Inc. v. Network Publ’g Corp.*, 737 F. Supp. 1338, 1342, 1349 (S.D.N.Y. 1990)
 20 (refusal to accept plaintiff’s ads not unlawful and complaint dismissed; “[e]ven assuming that
 21 defendant is a monopolist in its product market, unless plaintiff and defendant are in competition
 22 with one another, defendant has no duty to deal with plaintiff”); *see also Intergraph Corp. v. Intel*
 23 *Corp.*, 195 F.3d 1346, 1357 (Fed. Cir. 1999) (“the presence of a competitive relationship is
 24 fundamental to invoking the Sherman Act to force access to the property of another”); *Ferguson v.*
 25 *Greater Pocatello Chamber of Commerce, Inc.*, 848 F.2d 976, 983 (9th Cir. 1988) (“[defendant]
 26 has not refused to deal with anyone ... [plaintiffs] simply failed to outbid *their* competitors”).

27 Second, to the extent that Google is alleged to have terminated the AdSense agreements of
 28 firms that are, in fact, competitors, the allegation fails equally for the reason – given by the Court

1 (Order at 12) and summarized above – that Google has no duty to help its competitors. It would
 2 be a strange form of competition indeed if Google were required to help its competitors grow by
 3 allowing them to participate in the AdSense program. If a rival wants to compete against Google
 4 in this respect, the remedy is to develop its own alternative advertising program, not to free ride
 5 on the efforts that Google has made. *See SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 969-72
 6 (10th Cir. 1994) (prevention of free riding a legitimate efficiency justification warranting denial of
 7 access).

8 Third, the entire set of allegations is irrelevant to *this* case in any event because there is no
 9 allegation that *KinderStart*'s AdSense agreement was ever terminated. Whatever may or may not
 10 have occurred with the other websites, the question here is whether KinderStart has a claim for
 11 relief. The termination of someone else's agreement gives KinderStart no basis to sue.

12 d. **Pricing.** The only thing relating to the antitrust claims in the SAC that is
 13 truly “new” (as opposed to longer-winded) is the series of allegations about Google’s pricing
 14 practices. In brief, KinderStart asserts that Google charges high prices for ads, has increased
 15 prices, and discriminates among its customers in its pricing. The “discrimination” alleged is based
 16 on Google’s Landing Page Quality assessments. Specifically, the SAC alleges that sites deemed
 17 by Google to have a lower quality scores are subject to “minimum price floors” as well as price
 18 increases. SAC ¶ 64. These false allegations provide no basis for a claim because, even if
 19 assumed true, the conduct alleged is not exclusionary as a matter of law.

20 The Supreme Court specifically held in *Trinko*, 540 U.S. at 407, that charging high prices
 21 is not illegal. As the Court said, “[t]he mere possession of monopoly power, and the concomitant
 22 charging of monopoly prices, is not only not unlawful; it is an important element of the free-
 23 market system. The opportunity to charge monopoly prices – at least for a short period – is what
 24 attracts ‘business acumen’ in the first place; it induces risk taking that produces innovation and
 25 economic growth.” *Id.* Moreover, rivals have no basis to complain about prices *increases* by
 26 their competitors. As the Supreme Court recognized in *Matsushita Elec. Indus. Co. v. Zenith*
 27 *Radio Corp.*, 475 U.S. 574, 595-96 (1986), prices increases do not injure rivals, they operate to
 28 their benefit.

1 KinderStart's allegations of discriminatory pricing fare no better. The charging of
 2 discriminatory prices to customers is not an exclusionary act in the absence of evidence that the
 3 prices are "predatory," that is, below an appropriate measure of cost. *See, e.g., Brooke Group Ltd.*
 4 *v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222 (1993). The charging of low, but non-
 5 predatory, prices is in fact the essence of competition. As the Supreme Court has stated, "[l]ow
 6 prices benefit consumers regardless of how those prices are set, and so long as they are above
 7 predatory levels, they do not threaten competition." *Atlantic Richfield Co. v. USA Petroleum Co.*,
 8 495 U.S. 328, 340 (1990). Absent allegations of below-cost predatory pricing, therefore, attacks
 9 on Google's pricing policies as discriminatory necessarily fail. *See Trinko*, 540 U.S. at 407-08;
 10 *Soap Opera Now*, 737 F. Supp. at 1349.

11 The decision in *Monahan's Marine, Inc. v. Boston Whaler, Inc.*, 866 F.2d 525 (1st Cir.
 12 1989) (Breyer, J.), is on point. In *Monahan's*, the plaintiff alleged that defendant Boston Whaler,
 13 Inc. sold boats to plaintiff's competitors at prices lower than, and terms better than, it offered to
 14 plaintiff. *Id.* at 526. The court held that "Whaler's actions (which we shall call 'price
 15 discrimination') are not, on balance, anticompetitive for Sherman Act purposes." *Id.* at 527. In
 16 doing so, the court stated, *inter alia*, that "the Sherman Act does not normally forbid a seller from
 17 charging a low, nonpredatory price, even though that price may make it harder for a competitor to
 18 enter, or to remain in, the market." *Id.* at 528. It also noted that there is "nothing anticompetitive
 19 in the simple fact that a seller selectively cuts prices, or offers other favorable terms, to some of its
 20 dealers, even though such discrimination harms the non-favored dealers." *Id.* at 529; *accord, e.g.*,
 21 *AAA Liquors, Inc. v. Joseph E. Seagram & Sons, Inc.*, 705 F.2d 1203, 1207 (10th Cir. 1982) ("We
 22 do not think section one of the Sherman Act requires the manufacturer to offer the same price to
 23 all its customers"); *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 887 (9th Cir. 1982) ("the price
 24 discrimination which results where buyers seek competitive advantage from sellers encourages the
 25 aims of the Sherman Act.").

26 e. ***Lack of Antitrust Injury.*** The final deficiency articulated by the Court with
 27 regard to KinderStart's antitrust claims was the lack of any "nexus" – the absence of any facts
 28 indicating that the injuries KinderStart alleges have any adverse impact on competition. *See*

1 Order at 11-12; Hearing Trans., June 30, 2006, at 5. It is an essential element of every antitrust
 2 claim that plaintiff allege “antitrust injury” – injury that reflects the adverse effect of the
 3 challenged conduct on competition. *Atlantic Richfield*, 495 U.S. at 338-42. An adverse effect on
 4 the plaintiff, without a showing of harm to consumers and competition, is never enough. That is
 5 because the antitrust laws are for the protection of competition, not individual competitors.
 6 *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488-89 (1977); *see, e.g., Pool Water*
 7 *Prods. v. Olin Corp.*, 258 F.3d 1024, 1036 (9th Cir. 2001) (plaintiff’s falling market share fails to
 8 show antitrust injury because a “decrease in one competitor’s market share … affects competitors,
 9 not competition”).

10 A central flaw underlying KinderStart’s complaint is the absence of any allegation
 11 suggesting that the harm to KinderStart might equate with harm to the market – an increase in
 12 market prices, a reduction in market output or quality, or a decline in innovation. *Cf. United*
 13 *States v. Visa USA*, 344 F.3d 229, 240-41 (2d Cir. 2003). KinderStart does not, and indeed
 14 cannot, claim that the devaluation of its PageRank or the “Blockage” of its site will cause any kind
 15 of marketwide reduction in total website viewing or Internet advertising – and, indeed, the very
 16 concept borders on the preposterous. In analogous situations, the courts have made clear that even
 17 the total elimination of one or more firms as competitors in the market – a circumstance that
 18 KinderStart does not even allege – does not give rise to antitrust injury absent a showing that the
 19 harm to rivals will lead to increased market prices, decreased output, or other harm to the market
 20 as a whole. There are no such allegations here. *See, e.g., Rutman Wine Co. v. E&J Gallo Winery*,
 21 829 F.2d 729, 734-35 (9th Cir. 1987).

22 The Court’s ruling made clear that any further amended complaint would have to
 23 articulate, in some fashion, the manner in which KinderStart is alleging that *competition itself* has
 24 been harmed. KinderStart had ample opportunity – including 282 paragraphs in over 62 pages –
 25 to do so. That failure warrants dismissal with prejudice.

26 **B. Monopolization**

27 As the Court ruled, a claim for monopolization, as with a claim for attempted
 28 monopolization, requires sufficient allegations to establish a relevant market, exclusionary

1 conduct, and causal antitrust injury. Order at 13. For the reasons set forth in subsection A above,
 2 KinderStart's allegations in each of those three respects are entirely deficient. Dismissal of
 3 KinderStart's claims for monopolization, therefore, is equally appropriate.

4 KinderStart continues to maintain a purported "essential facilities" claim. As Google
 5 argued previously, it is doubtful that any such separate claim survived the Supreme Court's 2004
 6 decision in *Trinko*. See 540 U.S. at 410-11. Even assuming otherwise, however, this Court's
 7 order dismissed the claim on the basis that KinderStart failed to meet the requirements of the pre-
 8 *Trinko* decision in *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536 (9th Cir. 1991) –
 9 namely, that "[a] facility that is controlled by a single firm will be considered 'essential' only if
 10 control of the facility carries with it the power to *eliminate* competition in the downstream
 11 market." *Id.* at 544. As this Court explained: "While Kinderstart alleges that its Web traffic
 12 dropped 70%, and its ad revenue dropped 80%, it does not allege that it or similarly situated class
 13 members face elimination as a result of Google's conduct. FAC ¶¶ 74, 75. Instead it alleges that
 14 'in spite of Defendant Google's wrongful conduct as alleged above, [Kinderstart] continues to
 15 generate *sustainable* level of traffic and PageViews from visitors.' FAC ¶ 168 (emphasis added)." Order at 14. The Court added: "Kinderstart alleges that class members 'consistently receive
 16 significantly and relatively high rankings and referrals from other search engines such as MSN
 17 and Yahoo.' FAC ¶ 80." Accordingly, Kinderstart has not alleged adequately that Google, or its
 18 search engine, is an 'essential facility' within the Search Engine Market." *Id.* Nothing in the SAC
 19 even attempts to cure these defects. The monopolization claim should therefore be dismissed with
 20 prejudice.⁷

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23 ⁷ KinderStart's antitrust claims are barred by the First Amendment for the reasons stated in
 24 Google's original motion to dismiss. See *Jefferson County*, 175 F.3d 848. Although the Court
 25 declined to reach the issue in its opinion, Order at 15 n.6, the Court's opinion suggests that
Jefferson County might be distinguishable if Google were not a media defendant and its search
 26 results and PageRanks were not matters of public concern. The decision in *Jefferson County*,
 however, did not turn on those distinctions. Instead, the Tenth Circuit held that Moody's ratings
 27 were expressions of opinion that were entitled to full First Amendment protection. *Id.* at 859-60.
 In any event, Google is indeed a "media defendant," albeit in a different media, and its search
 28 results – if the SAC's allegations are accepted as true – are of significant public concern in that
 they "influence millions of users, business and organizations regarding the evaluation ... of
 Websites across the Internet." SAC ¶¶ 51, 91. *Paradise Hills Assocs. v. Procel*, 235 Cal. App.
 3d 1528, 1545 (1991) (public's access to consumer information is a matter of public interest
 (continued...))

1 **III. THE COURT SHOULD DISMISS KINDERSTART'S FREE SPEECH CLAIMS**
 2 **WITH PREJUDICE**

3 KinderStart's free speech claim remains frivolous because Google is not a state actor.
 4 Google is a corporation owned by its shareholders that operates a popular search engine for profit.
 5 In undertaking this endeavor, Google does not engage in any activity from which a Court could
 6 infer that its actions are remotely that of the government. While KinderStart devotes numerous
 7 paragraphs in the SAC chronicling various mundane ties Google has with the government, none of
 8 those allegations comes close to satisfying the established tests for determining whether state
 9 action is present, or that Google's actions challenged in this case have anything to do with the
 10 government. Indeed, courts have held that companies with far more substantial ties to the
 11 government are not state actors. *See Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352-3
 12 (1974) (monopolist utility company was not a state actor). Because the free speech claims were
 13 baseless when asserted in the FAC and remain baseless in the SAC, they should be dismissed with
 14 prejudice. *See Price v. State of Hawaii*, 939 F. 2d 702, 709 (9th Cir. 1991) (affirming award of
 15 attorney's fees "because the complaint so patently failed to state a claim" that private party was
 16 acting under color of state law).

17 **A. Google Is Not a State Actor Under the First Amendment**

18 The Court's Order dismissing KinderStart's FAC noted five tests for determining the
 19 presence of state action. The first four are: "(1) public function; (2) joint action; (3) governmental
 20 compulsion or coercion; and (4) governmental nexus." *Kirtley v. Rainey*, 326 F.3d 1088, 1092
 21 (9th Cir. 2003). The fifth test, seemingly a species of the joint action test, examines whether there
 22 is a symbiotic relationship between the private actor and the government with respect to the
 23 challenged actions. *See Brunette v. Humane Society of Ventura County*, 294 F.3d 1205, 1213 (9th
 24 Cir. 2002). None of these tests could possibly apply here.

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 28 (...continued from previous page)
 deserving of highest constitutional protection). This point thus remains an alternative ground for
 dismissal of the antitrust claims.

1 As the Court previously noted, the public function test is inapplicable because “the
 2 function at issue must be both traditionally and exclusively governmental.” *See Lee v. Katz*, 276
 3 F.3d 550, 555 (9th Cir. 2002). KinderStart alleges that Google performs a state function by “the
 4 creation, management and stewardship of a universal, public search engine reaching a dynamic
 5 archive and repository of the world’s Website content on all essential topics and subject matter for
 6 viewing and use by members of the general public.” SAC ¶ 253. The Court rejected this identical
 7 allegation when dismissing the FAC: “these functions, made possible by new technology, are
 8 neither traditionally nor exclusively governmental.” Order at 7. The Court was assuredly correct
 9 in ruling that governments have not been the traditional and exclusive source of providing search
 10 engines to the public. *See, e.g., Jackson*, 419 U.S. at 352.

11 With respect to the joint action test, KinderStart does not allege that the government was
 12 involved in *the actions that allegedly violated its free speech rights*. *See* SAC ¶ 255 (alleging
 13 joint participation between Google and university libraries regarding a project to archive library
 14 books). This test is thus inapplicable. Likewise, as the Court previously ruled, the government
 15 compulsion/coercion test is not implicated by KinderStart’s complaint. Order at 8.

16 The government nexus/entwinement test does not apply because that test asks “whether
 17 there is such a close nexus between the State and the *challenged action* that the seemingly private
 18 behavior may be fairly treated as that of the State itself.” *Kirtley*, 326 F.3d at 1094-95 (emphasis
 19 added) (quotations and citation omitted). KinderStart points to Google’s performance under
 20 contracts with public libraries and other tangential relationships between the government and
 21 Google as providing the required nexus. *See, e.g.*, SAC ¶¶ 92-95, 254-55. KinderStart is
 22 mistaken. The *challenged action* in this case is that Google allegedly has not included KinderStart
 23 in the index of its search engine. The government is not alleged to have played any role in that
 24 action. *See George v. Pacific-CSC Work Furlough*, 91 F.3d 1227, 1231 (9th Cir. 1996) (affirming
 25 dismissal of complaint based on the First Amendment which failed to “plead a nexus between the
 26 government and the complained-of action”); *Gonzales v. Google, Inc.*, 234 F.R.D. 674, 679 (N.D.
 27 Cal. 2006) (describing Google challenge to a subpoena by the U.S. Department of Justice seeking
 28 data related to the content of Google’s index and queries from Google’s users). Indeed,

1 KinderStart has specifically pled that the government does *not* participate in the operation of
 2 Google's search engine. SAC ¶ 114. The nexus that is required to treat the actions of a private
 3 party as that of the state is plainly absent here. KinderStart's implicit suggestion that a company
 4 who contracts with the government becomes a state actor subject to First Amendment scrutiny for
 5 all purposes is absurd. *See George*, 91 F.3d at 1230 (rejecting claim that an official of a privately-
 6 owned prison was a state actor in employment matters and noting that “[a]n entity may be a state
 7 actor for some purposes but not for others.”).

8 The fifth test – the symbiotic relationship test – only applies in the narrowest of
 9 circumstances, where a private actor “confers significant financial benefits indispensable to the
 10 government’s ‘financial success.’” *Brunette*, 294 F.3d at 1213. This test was articulated by the
 11 Supreme Court in *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961). In *Burton*, the
 12 court found state action where the government “so far insinuated itself into a position of
 13 interdependence (with a private entity) that it must be recognized as a joint participant in the
 14 challenged activity.” *Id.* at 725. By its terms, this test is so rare that the Ninth Circuit has
 15 repeatedly and uniformly rejected its application. *See Vincent v. Trend Western Tech. Corp.*, 828
 16 F.2d 563, 569 (9th Cir. 1987) (no state action found where contractor “was most certainly not an
 17 indispensable element in the Air Force’s financial success” and “the government did not profit
 18 from [contractor’s] alleged unconstitutional conduct”); *Sever v. Alaska Pulp Corp.*, 978 F.2d
 19 1529, 1538 (1992) (“The fact that defendants rely heavily on government contracts does not, by
 20 itself, transform their action into state action.”); *Brunette*, 294 F.3d at 1214 (no state action found
 21 where private actor and government were not “financially integrated.”). Naturally, KinderStart
 22 has not pled any facts to remotely support the contention that Google has conferred benefits which
 23 are “indispensable” to the success of a government, and indeed, KinderStart has not even
 24 identified the government upon whom Google has allegedly bestowed such indispensable benefits.
 25 Google is, without question, not symbiotically related to the government in the operation of its
 26 search engine.⁸

27 _____
 28 ⁸ KinderStart’s intentionally vague legal conclusion regarding financial benefits is properly
 disregarded. *See SAC ¶ 254* (“The financial and other benefits provided means of Defendant’s
 (continued...)

1 Google also cannot be deemed a state actor by virtue of allegedly having dedicated private
2 property for public use. Under federal law a private actor does not have a First Amendment
3 obligation to safeguard the speech of others because it has opened its private property to the
4 public. *See Hudgens v. NLRB*, 424 U.S. 507 (1975) (where a party claimed the right to speak in a
5 publicly accessible, but privately owned shopping center, “the constitutional guarantee of free
6 expression has no part to play”); *Golden Gateway Center v. Golden Gateway Tenants Ass’n*, 26
7 Cal. 4th 1013, 1019-20 (2001) (noting that the *Pruneyard* decision “declined to follow the First
8 Amendment jurisprudence of the United States Supreme Court”); Erwin Chemerinsky,
9 *Constitutional Law: Principles and Policies* at 1103 (2d ed. 2002) (“There is no right to use
10 private property owned by others for speech. Because it is private property, the Constitution does
11 not apply.”).⁹

12 Even if there were an exception for property open to the public as a general matter,
13 KinderStart’s claim would still fail because Google’s “property” (*i.e.*, its search results), is not
14 open to the public at all. Google alone speaks through its search results and has complete

⁹ The case of *Venetian Casino Resort, LLC v. Local Joint Executive Bd.*, 257 F.3d 937, 943 (9th Cir. 2001) is consistent with this principle because in that case the property owner, the Venetian casino, had contracted with the State of Nevada to permit pedestrian traffic on a sidewalk that was built to replace a public sidewalk eliminated at the casino's behest. A servitude on the Venetian property was recorded and required "unobstructed public use of the sidewalk." *Id.* That case is viewed properly under the rubric of the traditional state action tests noted above instead of a separate test stemming from public access to private property because its outcome turned on the property owner's connection with the government. *See also Lee*, 276 F.3d 550 (9th Cir. 2002) (lessee of a town commons that agreed to regulate speech in the commons was deemed a state actor under the public function test). Indeed, in the absence of the agreement with the state to provide unobstructed pedestrian access, the Venetian's sidewalks would not have been subject to First Amendment restrictions. *See, e.g., Utah Gospel Mission v. Salt Lake City Corp.*, 425 F.3d 1249, 1255 (10th Cir. 2005) (holding that a block-long section of a Main Street in Salt Lake City which was sold to a church to promote pedestrian traffic was not subject to First Amendment obligations where deed did not require purchaser to accommodate expressive conduct and noting that "property does not become a public forum simply because a private owner generally opens his property to the public"). Regardless, whether viewed analytically as a state action case or a public forum case, the facts of *Venetian* are entirely dissimilar to the present one. Google has not contracted with the government to provide unobstructed public access to its search results and a search engine itself is not a traditional public forum like a public sidewalk.

1 dominion over them. SAC ¶¶ 2, 128. Google indexes the web; ranks websites using proprietary
 2 algorithms; and provides its view of the most relevant web pages in response to user queries.
 3 Google's private search engine has become popular precisely because Google makes editorial
 4 decisions about the relevance of websites in relation to search queries. The fact that Google's
 5 speech is freely *accessible* to the public does not transform its private search engine into a forum
 6 that has been dedicated to the public any more than a freely distributed newspaper must
 7 accommodate the speech of others simply because it is made available to the public at large.
 8 Indeed, as the Court has correctly noted, far from dedicating the operation of its search engine to
 9 the public for speech, Google alone runs its search engine on behalf of its shareholders as an
 10 integral part of a for-profit corporation. Order at 9.

11 **B. KinderStart's California Free Speech Claim Also Fails**

12 KinderStart's claim for alleged violation of its free speech rights under California's
 13 Constitution fares no better. Under *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899, 910
 14 (1979), *aff'd*, 447 U.S. 74 (1980), the actions of a private owner of a publicly-accessible shopping
 15 center may constitute state action for purpose of California's free speech clause. However,
 16 Google's search engine plainly does not fall within this very limited exception which is applicable
 17 only where private property serves as the functional equivalent of a traditional public forum. *See*,
 18 *e.g.*, *Golden Gateway*, 26 Cal. 4th at 1033 ("private property must be public in character before
 19 California's free speech clause may apply"); *Trader Joe's Co. v. Progressive Campaigns, Inc.*, 73
 20 Cal. App. 4th 425, 434 (1999) (grocery store not subject to California free speech clause because
 21 it "opens its property to the public so the public can buy goods. It does not offer its property for
 22 any other use"); *Albertson's, Inc. v. Young*, 107 Cal. App. 4th 106 (2003) (same; private property
 23 must function as equivalent to traditional public forum). As noted, Google has not opened up its
 24 search results or index to the public and therefore cannot be subject to the free speech clause of
 25 the California constitution as a traditional public forum.¹⁰

26

27 ¹⁰ In dismissing KinderStart's California free speech claims in the FAC, the Court stated that
 28 "[n]owhere does Kinderstart allege that Google has invited the public to speak through Google's
 search engine, either by enabling public editing of results/rankings or by promising that every
 website created by the public will be indexed, ranked, and displayed." Order at 10. The SAC is
 (continued...)

1 **IV. THE COURT SHOULD DISMISS KINDERSTART'S DEFAMATION CLAIM**
 2 **WITH PREJUDICE**

3 **A. KinderStart Has Failed to Identify a Provably False Statement**

4 KinderStart continues to claim that Google has defamed it by informing users of Google's
 5 toolbar that Google rates the KinderStart site a 0-PR. *See SAC ¶¶ 271, 275.* But on its face, there
 6 is nothing about that statement that is false. KinderStart's site truly is a 0-PR as that is the rating
 7 that Google currently assigns to it. Because the statement is literally true, no defamation claim
 8 can be based on the 0-PR designation alone. *Hejmadi v. Amfac, Inc.*, 202 Cal. App. 3d 525, 552-
 9 53 (1988) ("Truth is an absolute defense to an action for defamation"); *Hughes v. Hughes*, 122
 10 Cal. App. 4th 931, 938-9 (2004).

11 To supply the requisite element of falsity for its defamation claim, KinderStart appears to
 12 contend that the 0-PR statement for its site falsely *implies* that the site is not relevant and falsely
 13 *implies* that the site has no content or links to it. *See SAC ¶¶ 271, 275.* Neither supposed
 14 implication states a claim for defamation. The supposed implication from Google's 0-PR rating
 15 that KinderStart's site is "irrelevant," is a statement of non-actionable opinion. Google is merely
 16 stating its view that the KinderStart site is relatively unimportant or unappealing to users. *See*
 17 SAC ¶¶ 7, 140, 272, 276. But what Google deems relatively unimportant, unappealing or

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21 likewise deficient for these reasons. However, Google disagrees that such allegations would be
 22 sufficient to state a claim under the free speech clause of the California Constitution because the
 23 holding of the *Pruneyard* case – that owners of private, real property functioning as the
 24 equivalent of a traditional public forum can be subject to free speech obligations – does not apply
 25 to online websites. A privately owned and operated website is simply not a traditional forum for
 26 speech. *See United States v. American Library Ass'n, Inc.*, 539 U.S. 194, 206 (2003) (rejecting
 27 the contention that the Internet was a traditional public forum and noting that "[t]he doctrines
 28 surrounding traditional public forums may not be extended to situations where such history is
 lacking."). This is the case even if the public is invited to collaborate regarding the website's
 content. Indeed, Wiki-based websites and open source projects depend upon collaboration from
 the public, but their owners must be permitted to edit and remove contributions that they find
 unhelpful, harmful or contrary to their mission. When "balanc[ing] the competing interests of
 the property owner and of the society with respect to the particular property or type of property
 at issue" in the online context, *Trader Joe's*, 73 Cal. App. 4th at 433, the proper conclusion is
 that privately owned websites have the *per se* freedom to operate as they see fit without
 accounting for the free speech rights of California's residents because websites have never been
 deemed a traditional public forum. The holding of *Pruneyard*, which has been limited to its facts
 by subsequent cases, should not be radically extended to the online context.

1 irrelevant may be of significant relevance, appeal or importance to a user. A claim for defamation
 2 cannot be based on the vagaries of such opinions. *See Section I(A), supra*, at 2-5.

3 As for the supposed implication that there is not content on, nor links to, KinderStart's site,
 4 there is absolutely nothing in any of KinderStart's complaints to suggest that such implied
 5 assertions are properly drawn from a 0-PR. KinderStart points to no statements by Google to that
 6 effect and does not otherwise allege any facts showing that users would reasonably draw that
 7 implication.¹¹ Simply put, the average user of the Google toolbar would not reasonably conclude
 8 that a 0-PR rating for a website means that the site has no content or links to it. Accordingly, no
 9 claim for defamation can be based upon that supposed implication either. *See Morningstar, Inc. v.*
 10 *Superior Court*, 23 Cal. App. 4th 676, 688 (1994) ("the publication is to be measured not so much
 11 by its effect when subjected to the critical analysis of a mind trained in the law, but by the natural
 12 and probable effect upon the mind of the average reader"); *Ringler Assocs., Inc. v. Maryland Cas.*
 13 *Co.*, 80 Cal. App. 4th 1165, 1179 (2000).

14 Finally, seizing on comments in the Court's Order, KinderStart includes in its defamation
 15 count an allegation regarding Google's use of algorithms in assessing PageRanks. *See SAC ¶¶*
 16 276-77. Remarkably, KinderStart claims that Google "holds out in public PageRank as an opinion
 17 of the value of a given website," thereby conceding Google's First Amendment defense for
 18 matters of opinion. It follows this bizarre concession with the conclusory assertion that despite
 19 Google's public description of PageRank as its opinion, users understand it as something objective
 20 based on "one or more computer algorithms." SAC ¶ 276. KinderStart offers no factual
 21 allegations to support this assertion.

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24 ¹¹ When a user "mouses over" the PageRank display on the Google toolbar, the toolbar
 25 displays the message: "PageRank is Google's measure of the importance of the page." Compl. ¶
 26 5. There is certainly nothing in that message to imply that a page has no content or links to it.
 27 Further, in a "help" section for toolbar users on its website, Google describes PageRank as: "The
 28 importance Google assigns to a page based on which other webpages link to it and many other
 variables." Volkmer Decl., Ex. A. Accordingly, users are told PageRank depends in part on
 which sites link to a page as well as "many other variables." Nowhere does Google state that
 PageRank is simply a count of the number of links to a particular page. Given that, it is simply
 not possible to draw the implied representation that KinderStart apparently maintains is present
 here.

1 As Google explained in the last round of briefing, the fact that Google says that it uses
 2 algorithms in its PageRank determination does not transform its inherently subjective assessment
 3 of a website's "value" or "importance" into something "objective." To the contrary, the
 4 determinations of what factors to include in assessing the importance of a website and how to
 5 weigh those factors are necessarily subjective. *See, e.g.*, Motion to Dismiss FAC at 10, Reply in
 6 Support of Defendant's Special Motion to Strike at 9–10. As one leading law professor recently
 7 explained in a Yale law journal:

8 Ranking algorithms obviate the need for humans to make individualized ranking decisions for
 9 the millions of search terms used by searchers, but they do not lessen the role of human
 10 editorial judgment in the process. Instead, the choice of which factors to include in the
 ranking algorithm, and how to weight them, reflects the search engine operator's editorial
 judgments about what makes content valuable.

11 Eric Goldman, *Search Engine Bias and the Demise of Search Engine Utopianism*, 8 Yale J.L. &
 12 Tech. 188 (Spring 2006). It is neither objectively correct nor incorrect, for example, for Google to
 13 use the number and quality of links to a site in assessing the site's importance; it is simply
 14 Google's subjective view of some of the factors that should bear on the question of importance.
 15 Others search engines may use algorithms to rate sites' importance based on the number of
 16 visitors to a page in a given period, based on the number of times a particular search term appears
 17 on the page, or take some altogether different approach. Ultimately, individual users decide
 18 which search engine's opinion of importance to credit.

19 As if to drive home the point that Google's use of algorithms does not make PageRank
 20 objective, KinderStart offers the allegation that Google uses *algorithms* to "programmatically
 21 punish" with a 0-PR, sites that Google believes to have "inferior page quality." *See* SAC ¶ 145
 22 (emphasis added). Thus, according to KinderStart, human beings at Google decide what
 23 constitutes inferior page quality and write algorithms to implement their subjective views rather
 24 than having to assess sites, one at a time. The fact that an algorithm is used and "mathematically"
 25 yield a 0-PR does not make the inherently subjective determination of "page quality" objective or
 26 provably false. Likewise, it does not make the 0-PR that Google assigned to the KinderStart site
 27 any less of an opinion, or enable KinderStart to overcome the First Amendment's protection
 28 afforded to Google's expression. *See* Section I(A), *supra*, at 2-5.

1 **B. KinderStart Fails to Identify Injury from Actionable Defamation**

2 KinderStart's failure to identify a provably false statement of fact leads KinderStart back
 3 to the same deficiency the Court identified in its Order dismissing KinderStart's FAC. The Court
 4 specifically instructed KinderStart to identify alleged injury from a provably false statement of
 5 fact, as opposed to harm caused merely by Google opining that the KinderStart site rated a 0-PR.
 6 Order at 21-22. KinderStart has failed to cure that deficiency. Its SAC again pleads only that
 7 KinderStart was harmed by the 0-PR for its site (*i.e.*, by Google opining that the site is not worth
 8 users' time). *Id.*; *see ¶¶ 281-82* (generally alleging injury from alleged defamation). How Google
 9 allegedly arrived at its opinion simply does not figure into KinderStart's allegations of supposed
 10 injury. *Id.*¹² For this reason as well, the defamation claim fails.

11 **C. KinderStart Fails to Allege Actual Malice**

12 KinderStart's defamation claim is deficient for yet another reason – KinderStart has failed
 13 to allege that Google acted with actual malice in presenting a 0-PR for KinderStart's site. In the
 14 absence of factual allegations of malice, any statement by Google, even if provably false, is
 15 subject to California's "common interest" and "fair comment" privileges.

16 **1. Malice**

17 California law defines malice as "that state of mind arising from hatred or ill will toward
 18 the plaintiff; provided, however, that such a state of mind occasioned by a good faith belief on the
 19

20 ¹² Because a 0-PR is not defamatory on its face, KinderStart is obligated to allege special
 21 damages. Cal. Civ. Code § 45a (a libel is only defamatory on its face if it is defamatory "without
 22 the necessity of explanatory matter"); *Forsher v. Bugliosi*, 26 Cal. 3d 792, 807 (1980). Special
 23 damages are those to property and business that are exclusively attributable to the alleged
 24 defamation, and to no other cause. Cal. Civ. Code § 48a(4). Under the Federal Rules, special
 25 damages allegations must be "specifically stated." Fed. R. Civ. P. 9(g). That means KinderStart
 26 must allege facts "showing an established business, the amount of sales for a substantial period
 27 preceding the publication, the amount of sales subsequent to the publication, [and] facts showing
 28 that such loss in sales were the natural and probable result of such publication." *Fowler v. Curtis
 Pub. Co.*, 182 F.2d 377, 379 (D.C. Cir. 1950); *American Needle & Novelty, Inc. v. Drew Pearson
 Mktg., Inc.*, 820 F. Supp. 1072, 1076 (N.D. Ill. 1993); *see also Action Repair, Inc. v. American
 Broad. Cos.*, 776 F.2d 143, 149-50 (7th Cir. 1985). KinderStart does not plead special damages,
 state them with the requisite specificity or attribute them exclusively to supposed defamation.
 Throughout its complaint, KinderStart generally alleges harm to its reputation, goodwill and
 some unspecified drop in business, but makes no attempt to tie those injuries exclusively to its
 0-PR rating. *See, e.g.*, SAC ¶¶ 213, 246, 267-68, 281-82. Again, KinderStart's defamation
 allegations are not sufficient to state a claim.

1 part of the defendant in the truth of the libelous publication or broadcast at the time it is published
2 or broadcast shall not constitute actual malice.” Cal. Civ. Code § 48a. *See Brown v. Kelly Broad.*
3 *Co.*, 48 Cal. 3d 711, 745 (1989), quoting *Agarwal v. Johnson*, 25 Cal. 3d 932, 944 (1979) (“The
4 malice referred to by [section 47(3)] is actual malice or malice in fact, that is, a state of mind
5 arising from hatred or ill will, evidencing a willingness to vex, annoy or injure another person.”).
6 “Mere allegations of malice are not sufficient … actual facts must be alleged, unless they are
7 apparent from the statement itself.” *Tschirky v. Superior Court*, 124 Cal. App. 3d 534, 539
8 (1981). As discussed, *supra*, KinderStart has not identified a provably false statement of fact by
9 Google. It certainly has not pled facts showing that Google acted with hatred or ill will toward
10 KinderStart in rating its site a 0-PR. Indeed, if anything, KinderStart has pled that Google
11 believes it is engaged in fully protected speech when it expresses its PageRank opinions. *See*
12 SAC ¶ 169; FAC ¶¶ 44-48 (Google believes its expression of PR is absolutely protected speech).

2. The Common Interest Privilege Bars KinderStart's Defamation Claim

14 California Civil Code Section 47(c) provides that an allegedly defamatory statement is
15 privileged if it is made “without malice, to a person interested therein … who is requested by the
16 person interested to give the information.” Cal. Civ. Code § 47(c). If the privilege is established
17 and the complaint lacks factual allegations of actual malice, a claim of defamation cannot survive
18 a motion to dismiss. *Locke v. Mitchell*, 7 Cal. 2d 599, 602 (1936) (“In such a case malice
19 becomes the gist of the action and it must exist as a fact before the cause of action will lie.”);
20 *Green v. Uccelli*, 207 Cal. App. 3d 1112, 1124 (1989) (existence of 47(c) privilege may be raised
21 at pleading stage); *Lundquist v. Reusser*, 7 Cal. 4th 1193, 1204 (1994).

22 Here, it is clear the common interest privilege applies. KinderStart itself alleges that to
23 view a website's PR, users must first visit Google.com and download the Google Toolbar. SAC ¶
24 78. Users must also affirmatively choose to enable the "PageRank" feature of the toolbar. *See*
25 Volkmer Decl. Ex. B ("users who download the Google Toolbar choose whether they want
26 PageRank enabled or disabled before installation is completed"). Finally, users must visit the
27 particular website (e.g., Kinderstart.com) and navigate their cursor over the PR icon on the
28 Toolbar. FAC ¶ 165 (PR is displayed when ks.com "is visited and viewed by the public"). Thus,

1 there is no question that those who receive Google's PR rating for the KinderStart site are
2 interested in and request that information. Because the elements of the common interest privilege
3 are met here and KinderStart has failed to allege actual malice, Google's 0-PR rating of the
4 KinderStart site is privileged under Section 47(c)(3). *Rodas v. Spiegel*, 87 Cal. App. 4th 513, 519
5 (2001) (section 47(c)(3) applies to preparation of inspection report requested by third parties);
6 *Pavlovsky v. Board of Trade*, 171 Cal. App. 2d 110 (1959) (where association members requested
7 names of debtors, distribution of the names of persons who were delinquent in the payment of
8 their accounts was privileged).

3. The Fair Comment Privilege Bars KinderStart's Defamation Claim

10 Google’s 0-PR rating is also protected by California’s common law “right of fair
11 comment” privilege. The fair comment privilege protects statements about “public officials,
12 scientists, artists, composers, performers, authors, and other persons who place themselves or their
13 work in the public eye” unless the statements are made with actual malice. *Brown*, 48 Cal. 3d at
14 732; *Institute of Athletic Motivation v. Univ. of Ill.*, 114 Cal. App. 3d 1, 8-9, n.4 (1980). In
15 California, the fair comment privilege applies not only to opinions but to false statements of fact
16 as well. *Id.*; *Maidman v. Jewish Publ’ns, Inc.*, 54 Cal. 2d 643 (1960) (editorial implicating that a
17 prominent member of the Jewish community misled a court as to the nature of a religious holiday
18 is privileged).

19 Here, there can be no doubt that KinderStart has placed itself and its site in the public eye.
20 SAC ¶¶ 28-32. It is therefore subject to public comment and criticism. Accordingly, where, as
21 here, KinderStart has failed to allege actual malice, Google's 0-PR rating for KinderStart's site is
22 again privileged and cannot support a defamation claim.

23 V. THE COURT SHOULD DISMISS KINDERSTART'S LANHAM ACT CLAIM
WITH PREJUDICE

25 KinderStart’s Lanham Act claim appears for the first time in the SAC. But the Court did
26 not grant KinderStart leave to inject new causes of action into the lawsuit, and instead merely
27 allowed it to try to fix the defects in its previously-pled claims. *See* Google’s Motion to Dismiss
28 and/or Strike Second Amended Complaint at 6-7 (“Dismiss/Strike Motion”), filed concurrently.

1 For this reason, and for Kinderstart's failure to plead the substantive elements of a Lanham Act
 2 claim discussed below, the claim should be dismissed.

3 **A. Google's Representations About Search Results**

4 KinderStart lacks standing to pursue a Lanham Act claim based on statements that Google
 5 allegedly made about the objectivity of its search results. SAC ¶ 238.¹³ To show standing,
 6 KinderStart must plead facts demonstrating: "(1) a commercial injury based upon a
 7 misrepresentation about a product; and (2) that the injury is 'competitive,' or harmful to the
 8 plaintiff's ability to compete with the defendant." *Jack Russell Terrier Network of N. Cal. v.*
 9 *American Kennel Club, Inc.*, 407 F.3d 1027 (9th Cir. 2005) (affirming dismissal
 10 where plaintiff did not suffer competitive injuries); *see Barrus v. Sylvania*, 55 F.3d 468 (9th Cir.
 11 1995) (same). To the extent Google can even identify in the SAC the specific statements at issue
 12 here, KinderStart has not alleged that those statements harmed it in any way. Rather, the SAC
 13 makes quite clear that the harm about which KinderStart complains – its "cataclysmic fall" in
 14 monthly page views and its "precipitous fall" in AdSense revenue – is blamed on "Blockage," *i.e.*,
 15 the absence of KinderStart's site from Google's search results. *See generally* ¶¶ 174-186 (under
 16 heading titled "Specific Harms to the Class Representative").

17 While Kinderstart alleges that Google's representations regarding the objectivity and
 18 fairness of its results cause users to choose Google over others, the allegation is hopelessly vague
 19 and the alleged injury hopelessly speculative. SAC ¶ 138; *see also* ¶ 241. More importantly,
 20 Kinderstart does not allege that it lost users because of statements by Google, only that it lost
 21 users due to "Blockage." *See, e.g.*, ¶¶ 174-176. Thus, KinderStart has no standing.¹⁴

22
 23

 24 ¹³ KinderStart also has the audacity to bring a Lanham Act claim based on a "guarantee"
 25 allegedly made by Google that it would disclose all instances in which it removed a site from its
 26 search results. SAC ¶ 243. However, Google never made any such guarantee and KinderStart
 27 has employed the use of misleading ellipses to manufacture this claim. *See* Dismiss/Strike
 28 Motion at 5-6. This allegation, which reflects sanctionable misconduct, should be rejected out of
 hand.

29 ¹⁴ As discussed *supra* at Section I, the First Amendment and § 230(c)(2) immunize Google
 30 from any liability for restricting access to material that Google finds objectionable. To the extent
 31 the Lanham Act claim is predicated on such actions, it fails to state a claim.

1 In addition to its standing problem, KinderStart cannot base a Lanham Act claim on
 2 Google's statements about its search results because it cannot identify the *false* representation of
 3 fact required to state a claim. *See Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1180 (9th Cir. 2003)
 4 (reversing denial of summary judgment for defendant where no false statements made in
 5 advertising). According to KinderStart, Google falsely represents that its search results are
 6 "objective and free from manipulation." KinderStart is mistaken. Google does not purport to
 7 provide a web index untouched by human hands, as KinderStart simplistically suggests. Rather,
 8 as KinderStart itself acknowledges, Google publicly discloses that it manually removes from its
 9 index those websites that fail to meet its quality standards, such as those that engage in practices
 10 to deliberately fool search engines. SAC ¶ 153. And when Google refers to its search results as
 11 "objective," it makes clear that it means that inclusion in its results is not for sale:

12 *Objectivity* We believe it is very important that the results users get from Google are
 13 produced with only their interests in mind. We do not accept money for search result ranking
 14 or inclusion. We do accept fees for advertising, but it does not influence how we generate our
 15 search results. SAC ¶ 121.¹⁵

16 That is the objectivity that Google offers; it has never promised not to scrutinize a computer-
 17 generated search index to address quality concerns. Indeed, Google explicitly advises users that
 18 "[w]e won't comment on the individual reasons a page was removed, and we don't offer an
 19 exhaustive list of practices that can cause removal." SAC ¶ 153. Google's representations about
 20 the objectivity of search results are simply not false and thus cannot form the predicate for a
 21 Lanham Act claim.¹⁶

22 ¹⁵ Without any factual support or explanation, Kinderstart contends that Google "has
 23 intentionally offered and delivered top positions in search results on Google's Search Results to
 24 companies, firms, advertisers and advertising agencies ... in exchange for certain conditions and
 25 consideration as accepted by Google." SAC ¶ 130; *see also* ¶ 131. If this vague and barely
 26 intelligible allegation is intended to suggest that Google accepts money for placement, it is false
 27 and irresponsible. Google has prepared, and if necessary will file a Rule 11 motion to address it.
 28 In any event, KinderStart lacks standing to pursue a false advertising claim against Google based
 on any alleged misrepresentation about its refusal to accept payment for search placement for the
 same reasons it lacks standing to pursue a claim based on Google's statements regarding its
 objectivity.

16 KinderStart's allegations concerning Google's purported illicit reasons for removing
 2 websites (such as religious and political) are entirely conclusory, false, and likewise will be the
 3 subject of a forthcoming Rule 11 motion against KinderStart. Regardless, KinderStart has not
 4 (continued...)

1 **B. Google's Assignment of PageRank**

2 KinderStart also contends that Google's assignment of a 0-PR to the KinderStart site
 3 "misrepresent[s] the qualities, value and importance" of the site. SAC ¶ 242. The Lanham Act,
 4 however, applies solely to false representations of *fact*. *Coastal Abstract Serv., Inc. v. First Am.*
 5 *Title Ins. Co.*, 173 F.3d 725, 730-31 (9th Cir. 1999) (reversing jury verdict where alleged false
 6 statement "was not a specific and measurable claim, capable of being provided false or of being
 7 reasonably interpreted as a statement of objective fact."); *Groden v. Random House, Inc.*, 61 F.3d
 8 1045, 1051 (2d Cir. 1995) (affirming summary judgment for defendant with respect to statement
 9 "GUILTY OF MISLEADING THE AMERICAN PUBLIC" applied to Kennedy assassination
 10 conspiracy theorist; "the statement ... is obviously a statement of opinion that could not
 11 reasonably be seen as stating or implying provable facts about Groden's work"). Because
 12 PageRank constitutes Google's opinion of the importance and likely relevance of KinderStart's
 13 website, it is not actionable.¹⁷ *See supra* at Section I(A), IV(A).

14 Google's assignment of 0-PR to Kinderstart is not cognizable under the Lanham Act for
 15 another reason: the Lanham Act only governs misrepresentations made in "commercial
 16 advertising and promotion." 15 U.S.C. § 1125(a)(1)(B). In the Ninth Circuit, to constitute
 17 commercial advertising and promotion, a representation must be:

18 (1) commercial speech; (2) by a defendant who is in commercial competition with plaintiff;
 19 (3) for the purpose of influencing consumers to buy defendant's goods or services. While the
 20 representations need not be made in a "classic advertising campaign," but may consist instead
 21 of more informal types of "promotion," the representations (4) must be disseminated
 22 sufficiently to the relevant purchasing public to constitute "advertising" or "promotion"
 23 within that industry.

24

 25 (...continued from previous page)
 26 pled any *facts* suggesting that any website, much less KinderStart's site, has suffered any injury
 27 due to Google's representations concerning its reasons for removing websites from its results.
 28 Accordingly, KinderStart lacks standing to pursue these fabricated claims.

29 ¹⁷ Because customers, as opposed to competitors, cannot demonstrate competitive injury,
 30 they do not have standing to bring claims for false advertising under the Lanham Act. *Barris*,
 31 55 F.3d at 469-470 (affirming motion to dismiss claims brought by class of consumer plaintiffs).
 32 Accordingly, to the extent Plaintiff seeks to bring a Lanham Act claim on behalf of a class of
 33 AdSense participants who allegedly lost revenue based on decreased PageRanks (*see ¶¶ 265-*
 34 266), those claims fail for the additional reason that the AdSense participants are customers, not
 35 competitors, of Google and therefore lack standing.

1 *Coastal Abstract*, 173 F.3d at 735. Google's PageRank is neither commercial speech,¹⁸ nor
 2 offered to influence consumers to buy Google's services.¹⁹ For this reason as well, no Lanham
 3 Act claim can be based upon it.

4 **VI. THE COURT SHOULD DISMISS KINDERSTART'S 17200 CLAIM WITH
 5 PREJUDICE**

6 **A. KinderStart's Vague AdSense Allegation Fails to State a Claim**

7 KinderStart's Section 17200 claim first alleges that "[m]embers of the public are likely to
 8 be deceived by Defendant Google's AdSense Program Agreement in believing and anticipating

9 ¹⁸ The "core notion" of commercial speech is "speech which does no more than propose a
 10 commercial transaction." *Rice*, 330 F.3d at 1181; *see also Oxycal Labs., Inc. v. Jeffers*, 909 F.
 11 Supp. 719, 725 (C.D. Cal. 1995) ("The key seems to be a determination of whether the speech is
 12 primarily motivated by commercial concerns, or whether there is sufficient non-commercial
 13 motivations."). The Supreme Court has developed a three pronged test to evaluate whether
 14 speech can properly be characterized as commercial. *Bolger v. Youngs Drug Prods. Corp.*, 463
 15 U.S. 60, 66-67 (1983). Typically, all of the *Bolger* factors must be present for the possibility of
 16 commercial speech (*id.* at 68 n.14), but PageRank does not meet a single one: (1) A PageRank is
 17 not in an advertising format, as it is not "speech about a product or service by a person who is
 18 offering that product or service at a price, directed to persons who may want, and be willing to
 19 pay for, that product or service." *Bolger*, 463 U.S. at 66-67; *Kasky v. Nike, Inc.*, 27 Cal. 4th 939,
 20 960-61 (2002). Rather, a PageRank is the type of editorial comment that Congress explicitly
 21 intended to exempt from liability under the Lanham Act. *See New.net, Inc. v. Lavasoft*, 356 F.
 22 Supp. 2d 1090, 1118 (C.D. Cal. 2004)(quoting legislative history of 1998 amendments to 43(a)
 23 explicitly exempting Consumer Reports ratings and similar material); *Wojnarowicz v. American
 24 Family Ass'n*, 745 F. Supp. 130 (S.D.N.Y. 1990) ("[43(a)] has never been applied to stifle
 25 criticism of the goods or services of another by one, such as a consumer advocate, who is not
 26 engaged in marketing or promoting a competitive product or service"); (2) A PageRank does not
 27 refer to a specific *Google* product or service to promote their sales, but instead reflects Google's
 28 rating of others' websites. *Bolger*, 463 U.S. at 66-67; *Kasky*, 27 Cal. 4th at 961; and (3) Google
 does not have a commercial motivation in displaying a PageRank. *Bolger*, 463 U.S. at 67.
 PageRanks are displayed for free to all users. SAC ¶¶ 8, 122. The fact that Google is a
 commercial enterprise does not change this analysis. *See Oxycal*, 909 F. Supp. at 725
 (disparaging statements in book not actionable as commercial speech even though defendants
 had economic motivation for sale of book).

29 ¹⁹ Google's assignment of a 0-PR is not made for the purpose of influencing the purchase of
 anything from Google because in assigning it, Google is not offering anything for sale. *See
 30 New.Net*, 356 F. Supp. 2d at 1111 ("Speech is not advertising speech where it does not promote
 31 the speaker's product for sale or encourage a commercial transaction with the user."). Indeed, 0-
 32 PR is not even visible to a user until after the conclusion of a "transaction" with Google, *i.e.*, a
 33 free download of the Google toolbar. *See supra* at 24 and n. 11. Google's after-the-fact
 34 communication of a website ranking does not relate to the "sale" of any Google product or
 35 service. *See Rice*, 330 F.3d at 1181 (alleged false statements on videotape jacket not likely to
 36 influence purchasing decision where video only accessible after sale made through Internet or
 37 mail order); *New.Net*, 356 F. Supp. 2d at 1118 ("Plaintiff has not adequately alleged, and as a
 38 matter of law, cannot allege, that the reference to Plaintiff in its software was 'for the purpose of
 influencing consumers to buy Defendant's goods or services' ... because the statements about
 [Plaintiff] appear only after [Defendant's software] has been downloaded and the scan has been
 run on the user's hard drive").

1 that through their Website they can realize adequate value and financial benefit by posting linked
 2 advertisements as offered by Defendant Google under the program.” SAC ¶ 265. The Court has
 3 already rejected this claim because it “neither identifies specific terms of the agreement that are
 4 deceptive nor indicates how the agreement as a whole is deceptive. Nor has Kinderstart alleged
 5 facts suggesting that the public would expect that participation in the program would prevent a
 6 participant’s removal from Results Pages or devaluation of PageRank.” Order at 17. The result
 7 should be no different the second time around.²⁰

8 **B. KinderStart’s Section 17200 Claim Fails Under Proposition 64**

9 KinderStart submits a barrage of other allegations in support of its Section 17200 claim.
 10 SAC ¶ 266.²¹ Google would be required to file a separate brief to address the reasons why each of
 11 these allegations separately fails under Section 17200 (and they all do). But such a brief is
 12 unnecessary for the overarching reason that the claim fails under California’s Proposition 64. In
 13 order to state an unfair competition claim following the passage of Proposition 64, KinderStart
 14 must show that it “has suffered injury in fact and has lost money or property *as a result of* [the]
 15 unfair competition.” Cal. Bus. & Prof. Code § 17204 (emphasis added). That is, the alleged acts
 16 of unfair competition must have *caused KinderStart* actual injury-in-fact and a loss of money or
 17 property. KinderStart does not even attempt to make such allegations in the SAC. *See* SAC ¶¶
 18 174-186. At most, KinderStart alleges that it has been harmed because its website no longer
 19 appears in Google’s search results because Google viewed its website as containing inferior
 20 content, not by any of these purported acts of unfair competition it throws out. Accordingly,
 21 KinderStart has not demonstrated that it has suffered injury-in-fact and lost money or property *as*

22

23 ²⁰ This allegation also fails because a plaintiff cannot state a Section 17200 claim by alleging
 24 that “members of the public” are likely to be deceived by a statement. As discussed below,
 25 under Proposition 64, a plaintiff must show that it relied on and was damaged by an allegedly
 26 deceptive statement.

27 ²¹ If KinderStart offers these allegations to support a claim under the “unfair” prong of
 28 Section 17200, it must show “conduct that threatens an incipient violation of an antitrust law, or
 29 that violates the policy or spirit of one of those laws because its effects are comparable to or the
 30 same as a violation of the law, or otherwise significantly threatens or harms competition.” *Cel-*
Tech Commc’ns, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 186-87 (1999). For the
 31 reasons stated *supra*, Section II, these allegations do not demonstrate conduct that significantly
 32 threatens or harms competition.

1 *a result of* the unfair competition allegations asserted. KinderStart has thus failed to state a claim
 2 under Section 17200 in light of Proposition 64. *See Laster v. T-Mobile USA, Inc.*, 407 F. Supp. 2d
 3 1181, 1194 (S.D. Cal. 2005) (plaintiffs failed to state a claim under Section 17200 where they did
 4 not allege that they had relied on false advertisements); *Pfizer Inc. v. Superior Court*, 141 Cal.
 5 App. 4th 290, 306 (2006) (after Proposition 64, a plaintiff in a false advertising case must have
 6 purchased the product in question in reliance on allegedly false statements and suffered an injury
 7 thereby); *Doe v. Texaco, Inc.*, No. 06-02820, 2006 WL 2053504, at *3 (N.D. Cal. Jul. 21, 2006)
 8 (dismissing Section 17200 claim where plaintiffs did not allege “that they lost money or property
 9 as a result of [defendant’s] false statements”); *Chip-Mender Inc. v. Sherwin-Williams Co.*, No. C
 10 05-3465, 2006 WL 13058, at *10 (N.D. Cal. Jan. 03, 2006) (dismissing Section 17200 because
 11 counterclaimant “must plead both that it suffered an injury in fact and that it lost money or
 12 property as a result of unfair competition, neither of which allegations appear in the
 13 counterclaim.”). KinderStart’s Section 17200 claim should be dismissed with prejudice for failure
 14 to state a claim under Rule 12(b)(6).

15 **C. KinderStart Lacks Article III Standing to Bring a Section 17200 Claim**

16 KinderStart’s allegations also do not satisfy the “case or controversy” limitation of Article
 17 III requiring that a plaintiff have standing in order to bring any type of claim in federal court. *See*
 18 *Vermont Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 771 (2000) (hereinafter
 19 “Stevens”). A litigant must specifically set forth facts sufficient to satisfy both the “causation”
 20 and “redressability” prongs of Article III’s standing requirements by showing that his injury
 21 “fairly can be traced to the challenged action” and “is likely to be redressed by a favorable
 22 decision.” *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (citations omitted); *see also Nike,*
 23 *Inc. v. Kasky*, 539 U.S. 654, 667 (2003). KinderStart’s unfair competition claims are all subject to
 24 dismissal because it has not, and cannot, identify any redressable injury.

25 To support a finding of redressability, plaintiff must demonstrate “a ‘substantial
 26 likelihood’ that the requested relief will remedy the alleged injury in fact.” *Stevens*, 529 U.S. at
 27 771. KinderStart’s Section 17200 claims establish nothing of the kind because the remedies under
 28

1 Section 17200 are limited to restitution and injunctive relief. *See Korea Supply Co. v. Lockheed*
2 *Martin Corp.*, 29 Cal. 4th 1134, 1144 (2003).

3 With respect to restitution, no relief can be granted because KinderStart does not allege
4 that it paid Google anything. *Korea Supply*, 29 Cal. 4th at 1149 (“object of restitution is to restore
5 the status quo by returning to the plaintiff funds in which he or she has an ownership interest”);
6 *Cortez v. Purolator Air Filtration Prods. Co.*, 23 Cal. 4th 163, 177 (2000) (restitution award is for
7 “money that had once been in the possession of the person to whom it [is] to be restored”); *Colgan*
8 *v. Leatherman Tool Group, Inc.*, 135 Cal. App. 4th 663, 697-98 (2006) (same). The only
9 injunction KinderStart could possibly seek based on the facts alleged – forced inclusion in
10 Google’s search engine index or forced assignment of a PageRank – is also unavailable as a matter
11 of law. The First Amendment bars KinderStart from obtaining an injunction compelling Google
12 to recommend KinderStart in its search results or give its site a particular PR rating. *See supra* at
13 Section I(A). Because it has not stated a claim for entitlement to either of the remedies provided
14 by Section 17200, KinderStart’s unfair competition claim should be dismissed with prejudice
15 under Rule 12(b)(1).

16 Dated: September 22, 2006

17 WILSON SONSINI GOODRICH & ROSATI
18 Professional Corporation

19 By: /s/ David H. Kramer
20 David H. Kramer

21 Attorneys for Defendant Google Inc.